

Pericles Should Learn to Fix a Leaky Pipe – Why Trial Advocacy Should Become Part of the LLB Curriculum (Part 1)



WH Gravett*

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Author

Willem H Gravett

Affiliation

University of Pretoria
South Africa

Email willem.gravett@up.ac.za

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Abstract

It is a sad fact that at most university law schools in South Africa, a student can graduate without ever having set foot in a courtroom, and without ever having spoken to, or on behalf of, a person in need of advice or counsel. The past several years have witnessed a swelling chorus of complaints that the current LLB curriculum produces law graduates who were "out of their depth" in practice. My purpose is to make a case for the inclusion in the LLB curriculum of a course in trial advocacy. This endeavour of necessity invokes the broader debate over the educational objectives of a university law school – a debate memorably framed by William Twining as the two polar images of "Pericles and the plumber". My thesis is that the education of practising lawyers should be the primary mission of the university law school. The first part of this contribution is a response to those legal academics who hold that the role of the law school is to educate law students in the theories and substance of the law; that it is not to function as a trade school or a nursery school for legal practice. With reference to the development of legal education in the United States, I argue that the "education/training" dichotomy has been exposed as a red herring. This so-called antithesis is false, because it assumes that a vocational approach is necessarily incompatible with such values as free inquiry, intellectual rigour, independence of thought, and breadth of perspective. The modern American law school has shown that such so-called incompatibility is the product of intellectual snobbery and devoid of any substance. It is also often said that the *raison d'être* of a university legal education is to develop in the law student the ability "to think like a lawyer". However, what legal academics usually mean by "thinking like a lawyer" is the development of a limited subset of the skills that are of crucial importance in practising law: one fundamental cognitive skill – analysis – and one fundamental applied skill – legal research. We are not preparing our students for other, equally crucial lawyering tasks – negotiating, client counselling, witness interviewing and trial advocacy. Thinking like a lawyer is a much richer and more intricate process than merely collecting and manipulating doctrine. We cannot say that we are fulfilling our goal to teach students to "think like lawyers", because the complete lawyer "thinks" about doctrine *and* about trial strategy *and* about negotiation *and* about counselling. We cannot teach students to "think like lawyers" without simultaneously teaching them what lawyers do. An LLB curriculum that only produces graduates who can "think like lawyers" in the narrow sense ill-serves them, the profession and the public. If the profession is to improve the quality of the services it provides to the public, it is necessary for the law schools to recognise that their students must receive the skills needed to put into practice the knowledge and analytical abilities they learn in the substantive courses. We have an obligation to balance the LLB curriculum with courses in professional competence, including trial advocacy – courses that expose our students to what actually occurs in lawyer-client relationships and in courtrooms. The skills our law students would acquire in these courses are essential to graduating minimally-competent lawyers whom we can hand over to practice to complete their training. The university law school must help students form the habits and skills that will carry over to a lifetime of practice. Nothing could be more absurd than to neglect in education those practical matters that are necessary for a person's future calling.

Keywords

Trial advocacy; legal skills; legal education; LLB curriculum

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In the last analysis, the law is what the lawyers are.
And the law and lawyers are what the law schools make them.¹

1 Introduction

Imagine a medical student graduating from university without ever having set foot in a hospital, and without ever having spoken to or examined a patient. It is almost too ludicrous to contemplate. Yet, it is a sad fact that at most university law schools in South Africa, a student can graduate without ever having set foot in a courtroom, and without ever having spoken to, or on behalf of, a person in need of advice or counsel.² We in legal academia apparently expect our students to gain the clinical skills of lawyering elsewhere, presumably in the hurly-burly of practice.

The past several years have witnessed a swelling chorus of complaints that the current LLB curriculum produces law graduates who were "out of their depth" in practice.³ In 2016 the Council on Higher Education (CHE) undertook an evaluation of the LLB programmes at all the South African law faculties in accordance with the national standards set for the LLB degree. Legal education is again in a period of flux and introspection. It is also a time of opportunity and potential.

Against the background of the renewed focus on the LLB curriculum, my purpose is to make a case for the inclusion in that curriculum of a course in trial advocacy. This endeavour of necessity invokes the broader debate over the educational objectives of a university law school – a debate memorably framed by William Twining, "for the sake of alliteration", as the two polar images of "Pericles and the plumber".⁴ The image of the lawyer as plumber:⁵

[I]s essentially someone who is master of certain specialised knowledge, 'the law', and certain technical skills. What he needs is a no-nonsense specialised

¹ Felix Frankfurter as quoted in Edwards 1992 *Mich L Rev* 34.

* Willem H. Gravett. BLC LLB (UP) LLM (Notre Dame) LLD (UP). Senior Lecturer, Department of Procedural Law, University of Pretoria. Email: willem.gravett@up.ac.za.

² At the University of Johannesburg, undergraduates apparently have to do compulsory work at the law clinic. O'Brien Date Unknown <http://sastudy.co.za/article/uj-law-graduates-better-prepared-for-work/>. At other institutions, work in the law clinic constitutes part of a final year elective course. There are also many universities in South Africa that do not have the resources to even operate a law clinic.

³ See, for example, comments by Judge Achmat Jappie: Jappie 2012 <http://www.legalbrief.co.za/article.php?story=20120730085518253>.

⁴ Twining 1967 *LQR* 396-426. Also see generally Campbell 2014 *Stell LR* 15-33.

⁵ Twining 1967 *LQR* 397.

training to make him a competent technician. A 'liberal' education in law for such a functionary is at best wasteful; at worst it can be dangerous.

At the other extreme is the image of the lawyer as Pericles – "the law-giver, the enlightened policy-maker, the wise judge".⁶

Let me state my position clearly at the outset: I fully support Richard Posner – a United States Federal Judge *and* a leading legal scholar – that the education of practising lawyers is, or at least should be, the primary mission of the university law school.⁷ The first part of this article is a response to those legal academics who take a different position, and who renounce law teaching as an endeavor in pursuit of professional education.⁸

2 What should the educational objectives of the university law school be?

One of the central questions with regard to restructuring the LLB degree is whether it should be designed for no-nonsense, technically competent plumbers, or for liberally-educated Periclean thinkers, or for something in between?⁹

Judges, practitioners, the Law Society of South Africa (LSSA) and the General Council of the Bar have universally expressed grave concern over the obvious inability of law school graduates to transition from the study of law to the practice of law.¹⁰ For example, in 2012 the Professional Provident Society (PPS) conducted a survey that indicated that "out of 500 attorneys surveyed ... only 21% believed [that] the current LLB-degree sufficiently prepares prospective legal practitioners to succeed in the profession".¹¹ During the LLB Summit in May 2009, the late Nic Swart, chief executive officer of LSSA and LEAD,¹² stated that the legal profession requires lawyers with the skills to apply the law, who are ethical, who understand the pressures of the profession, and who understand what is necessary to manage a

⁶ Twining 1967 *LQR* 398.

⁷ Posner 1981 *Yale L J* 1129. Joel Modiri calls this assumption "problematic". Modiri 2013 *Stell LR* 460.

⁸ See Edwards 1992 *Mich L Rev* 41.

⁹ Brownsword 1996 *Law Teacher* 1.

¹⁰ For a summary of the criticisms of the LLB degree by various stakeholders, see Louw and Broodryk 2016 *Stell LR* 535-536; Singo 2016 *Stell LR* 554.

¹¹ As quoted in Louw and Broodryk 2016 *Stell LR* 535.

¹² The Legal Education and Development department of LSSA.

successful law practice.¹³ In short, "we should have [an LLB] that gives us value".¹⁴

However, recent scholarship rejects these expressions by the profession of the urgent need for competent, clinically trained law graduates. These scholars – who associate with the heterodox Critical Legal Studies (CLS) movement and who are all currently or were formerly affiliated with the department of jurisprudence at the faculty of law of the University of Pretoria (hence I refer to them as the "Pretoria Crits") – seem to suggest that the fundamental purpose of the university law school is to educate the lawyer as Pericles.¹⁵

2.1 The Pretoria Crit vision for critical "legal" education¹⁶

The unifying theme of the Pretoria Crits' prolific scholarship is that critical legal theory is the elixir for all that ails legal education in South Africa. For example, Joel Modiri¹⁷ claims that what is needed in response to the crisis in legal education is a "critical legal education, or an approach to the study and teaching of law grounded in a *critical* jurisprudence". Indeed, the Pretoria Crits believe that critical legal theory must be the "substantive pillar" of legal education.¹⁸ Emile Zitzke¹⁹ provides the clearest articulation of what this would entail, when he calls for teaching the law of delict (and, presumably, by extension every other substantive course in the LLB curriculum) "critically", as a response to our "conservative legal culture". By "critical" he means in "compliance with broad themes of critical legal theory", especially drawing from "Critical Legal Studies ... and its successive theoretical progeny (Feminist Legal Theory, Critical Race Theory and Queer Theory)".²⁰ Modiri²¹

¹³ Sedutla 2013 *De Rebus* 9.

¹⁴ Quoted in Sedutla 2013 *De Rebus* 9.

¹⁵ Madlingozi 2006 *Pulp Fictions* 5-24; Van Marle 2010 *SALJ* 628-645; Van Marle and Modiri 2012 *SALJ* 209-219; Modiri 2013 *Stell L Rev* 455-479; Modiri 2014 *Acta Academia* 1-24; Van Marle 2014 *Acta Academia* 196-215; Zitzke 2014 *Acta Academia* 52-76; Modiri 2016 *Stell LR* 507-534.

¹⁶ Elsewhere I have argued that the Pretoria Crits' radical political agenda within the law school is only superficially directed at the LLB curriculum. Their true ambition is revolution, not reform. They not only aim at the "deconstruction" of the South African legal system, but at its "destruction". Their "jurisprudence" is at its core "anti-law". See Gravett 2018 *SALJ* (forthcoming).

¹⁷ Modiri 2014 *Acta Academia* 1. Van Marle and Modiri 2012 *SALJ* 212 suggest that the "four-year LLB must be critically evaluated ... at present it does not sufficiently provide opportunities for critical thinking/acquisition of skills ...".

¹⁸ Modiri 2014 *Acta Academia* 10.

¹⁹ Zitzke 2014 *Acta Academia* 55.

²⁰ Zitzke 2014 *Acta Academia* 55.

²¹ Modiri 2013 *Stell LR* 473.

likewise states that legal education "must be grounded in theory" (by which of course he means critical legal theory).

The Pretoria Crits charge the "bureaucratic powers in the judiciary and the legal profession" with being "staggeringly unimaginative and myopic" in their understanding about what the teaching of law should entail.²² As a result, asserts Modiri,²³ we have been left with law faculties:

[W]hose intellectual, knowledge-producing and thinking functions have been usurped by the demands of the corporate legal profession and by a functionalist preoccupation with 'practical,' 'hard law', 'real-world' issues and activities which are deemed more relevant than the 'theoretical' or 'soft-law' ones.

The Pretoria Crits argue that "the value of legal education should not be indexed by how well it serves the needs and expectations of the legal profession and the judiciary".²⁴ According to the Pretoria Crits:²⁵

[L]aw faculties ... all over the country are being browbeaten, successfully it would seem, by the General Bar Council and the South African Law Society 'to produce graduates who are ready for the professions' ... At every turn we are being told that we have to teach students in a manner that will enable them to 'hit the ground running' when they complete their studies.

The Pretoria Crits conceive of the crisis in legal education "as mainly jurisprudential".²⁶ Of course, it is always tempting to conclude that the thing we are most confident we *can* do is the thing that is most important to be done.²⁷ The Pretoria Crits view the problem in jurisprudential terms, because jurisprudence is all they know. They reject the demands of the profession for an LLB curriculum that is relevant and adds value, because they are ignorant – and proudly so – of the demands of law practice.

²² Modiri 2014 *Acta Academia* 3.

²³ Modiri 2013 *Stell LR* 463.

²⁴ Modiri 2014 *Acta Academia* 1.

²⁵ Madlingozi 2006 *Pulp Fictions* 17.

²⁶ Modiri 2014 *Acta Academia* 4. In fact, they see a multitude of crises that are "themselves a confluence of the violence and disciplinarity of the law, the conservatism of our formalist legal culture, the disenchantment of law students and teachers, the neoliberalisation of knowledge, the corporatisation of the university, the erosion of an active, democratic, public sphere, the maintenance and legitimisation of inequality, misery and powerlessness, and the deeply entrenched supremacy of Western epistemological paradigms". Modiri 2014 *Acta Academia* 19. The problems at the heart of the crisis in legal education include "the racialised, gendered and Eurocentric order of knowledge that still subsists in most curricula; the problem of institutional racism and lack of transformation, and the rising corporatisation and privatisation of higher education, to name a few". Modiri 2014 *Acta Academia* 18.

²⁷ Keeton 1981 *Md L Rev* 222.

It is trite that the law school that ignores, or worse yet, contemptuously rejects the demands of practice is the law school that will quickly become obscure and irrelevant. Such a law school will serve the needs of only a handful of students who intend to pursue an academic career in legal theory, and ignore the hundreds who come to law school to receive a legal education. In her inaugural address on 11 May 2004, Caroline Nicholson²⁸ encapsulated the essential symbiosis between university law school, law students and the legal profession:

The objective of Law Faculties and Schools is to produce graduates suited to the role of legal professionals. They have an obligation therefore, not only to meet the needs and expectations of their learners but of the profession too. For this reason it is essential that legal academics be aware of what learners want and need, and marry that with the wants and needs of the profession.

The Pretoria Critics seem to be consumed by an almost insalubrious obsession to establish university legal studies as a purely academic intellectual pursuit akin to humanities studies. They insist that a critical legal education is "inseparab[le] ... from a conception of law as a humanities discipline".²⁹ They lament the fact that "none of the major political currents dominating the social sciences and humanities and public discourse have led to a meaningful revision of how we teach law and how we structure the LLB curriculum".³⁰

The Pretoria Critics' (mis)conception of law as a humanities discipline leads them to pursue an academic agenda that seeks a severance of legal education from the mainstream of the legal profession. Thus, they draw a sharp distinction between "education" (the main tent) and "training" (the side-show).³¹ "Practical training", claims Karin van Marle,³² is apparently what our students should undergo after graduation, and is "... separate from the education we as academics should be giving them". Thus, according to Van Marle's classification "academics" should "educate", while "practitioners"

²⁸ Ironically, as head of the department of jurisprudence at the University of Pretoria faculty of law. As quoted in Madlingozi 2006 *Pulp Fictions* 15.

²⁹ Modiri 2014 *Acta Academia* 15, 19; Modiri 2013 *Stell LR* 475.

³⁰ Modiri 2016 *Stell LR* 508-509. The Pretoria Critics make no secret of their ultimate objective. They state emphatically that their effort to "apprehend law as a humanities discipline" is also an effort to "distinguish or distance law and legal study from [the] typical styles of legal inquiry and pedagogy ...". Modiri 2014 *Acta Academia* 16-17. Modiri describes his perception of the "three currently typical styles of legal inquiry and pedagogy, namely the doctrinal approach, the scientific approach and the business/corporatist approach". Modiri 2014 *Acta Academia* 16-17.

³¹ Van Marle 2010 *SALJ* 643-644.

³² Van Marle 2010 *SALJ* 644. Van Marle advocates that we should "giv[e] students the freedom to be educated, to pursue academically multiple possibilities without too quickly, prematurely limiting them to the realities of practice". Van Marle 2010 *SALJ* 644.

should "train". Could Van Marle make this argument concerning any other professional school? Would she entrust her own well-being to an engineer, an architect or a physician who had not been "trained" in professional competencies while at university?³³

Moreover, the Pretoria Crits are committed to the pursuit of knowledge and free inquiry all for their own sake, as having an intrinsic value, as being a valuable end in itself.³⁴ They accuse the majority of legal academics as having an institutional commitment only to wealth creation, to training people so that they can perform more valuable roles in an expanding modern economy.³⁵ What the Pretoria Crits propose is that we give our law students "the freedom to be educated, to pursue academically multiple possibilities without too quickly, prematurely limiting them to the realities of practice".³⁶

Although admirable in concept, it is completely devoid of any reality in the South African context. As evidenced by the shortening of the LLB to a four year degree in response to social need and economic reality, there is limited time that can be allocated to law students pursuing a broad-based liberal education, similar to that which law students in the United States have the luxury to engage in before commencing law studies. It ill-behooves the university law school in South Africa, with the present day costs of legal education, both in terms of money and time, to suggest to students that they should wait until after graduation to learn to be a lawyer. Potential students will simply come to look upon law school as irrelevant because it fails to gird its graduates for practice.

The Pretoria Crits' perfidious agenda of attempting to recast law as a humanities discipline would only result in future generations of "lawyers" being well-trained in legal theory, but ill-equipped in dealing with practical matters upon their entry into practice.³⁷ Consider, for example, the Pretoria Crits' view on "legal" writing. They look toward the "broad humanities" to shed "another light and a value of a different kind on language, reading, writing and thinking".³⁸ Modiri³⁹ writes:

³³ See Lubet 1989-1990 *Cornell L Rev* 955.

³⁴ Modiri 2014 *Acta Academia* 3.

³⁵ Brownsword 1996 *Law Teacher* 5.

³⁶ Van Marle 2010 *SALJ* 644. The Pretoria Crits insist upon "the intrinsic value of knowledge, education, literature and theory as a means of living in, and illuminating the many worlds, spaces and contexts we inhabit". Modiri 2014 *Acta Academia* 3.

³⁷ Burger 1980-1981 *Fordham L Rev* 3.

³⁸ Van Marle 2014 *Acta Academia* 209.

³⁹ Modiri 2014 *Acta Academia* 17.

[H]umanities-inflected approaches to ... legal education adopt a more expansive and imaginative conception of what 'reading' entails and what a legal 'text' is; it thinks and writes in ways that are non- or even anti-scientific, suspending science ... and ... reject[ing] the annexation of law to the priorities of economics and business.

To Tshepo Madlingozi's mind, "reading and writing are more than just professional skills, but should be conceived of as attributes of an emancipated and imaginative self".⁴⁰ Students should be exposed to "more than just cases, text books and journal articles, but also [to] novels and poems".⁴¹

Thus, a renewed emphasis on writing skills in the new LLB curriculum should focus on more than "the strength of the legal research and argument" in "office memorandums, letters, heads of argument, contracts, and many other legal documents" that our students will draft in practice.⁴² By "writing", so Van Marle's⁴³ argument goes:

[W]e should mean something more than to compile legal documents; writing should go beyond mere functionality or economic gain ... One reason to start and keep writing is to respond to, and engage with the hardness of life, the disenchantment of the world, the loss of the ideal of justice.

I can understand that it is salutary, even admirable, to write about these things, but I fail to see their relevance to "writing" *in the context of a legal education*. As most practitioners understand, judges generally prefer lawyers who get to the point. Most cases are resolved on their facts, and the few that do present actual issues of law seldom require extended forays into the "disenchantment of the world".

There is a crucial distinction between the *legal* writing that the university law school should teach, and the kind of writing exalted by the Pretoria Crits. A work of philosophy or science can be good, even great, without wide acceptance. *Legal* writing (in whatever form), however, can never be good if it fails to persuade. In Aristotelean terms, a rhetorical argument that fails to persuade is perforce a poor argument.⁴⁴ In *legal* writing, persuasion is the only test that counts. Literary style, massive displays of scholarship, catchy phrases, erudition, enlightenment, learning and wisdom are all pointless if the

⁴⁰ Modiri 2016 *Stell LR* 527.

⁴¹ Modiri 2016 *Stell LR* 527. Writing thus encompasses "thinking and reflection and this would mean writing assessments should not be limited to drafting office memorandums or heads of arguments but also essays and journals". Modiri 2016 *Stell LR* 528.

⁴² Van Marle 2014 *Acta Academia* 209-210.

⁴³ Van Marle 2014 *Acta Academia* 210.

⁴⁴ Aristotle "Rhetoric Book I Chapter 3".

writing does not persuade.⁴⁵ Persuasive *legal* writing is what we should teach law students, along with proficiency in *legal* analysis, *legal* reasoning, *legal* argument and *legal* synthesis.

The fallacies inherent in the Pretoria Crit view of legal education are almost too glaring to merit articulation. Most obviously, viewing law schools as purely academic institutions that should focus exclusively on intellectualism, would leave a gaping hole in the education of lawyers. But that, I contend, is exactly the Pretoria Crits' goal. For the Pretoria Crits, the first purpose of a law school is to produce "citizens", "activists", "critical thinkers" and "intellectuals".⁴⁶ The first duty of the law professor is, according to the United States CLS scholar, Duncan Kennedy, to "radicalise" the law students, ie, to re-direct them towards neo-Marxism.⁴⁷

The Pretoria Crits have no interest in training lawyers.⁴⁸ They too much admire their humanities counterparts and view anything but theory as "unworthy". They apparently look down upon the practice of law as several cuts below plumbers in both the intellectual challenge and the moral utility of their work.⁴⁹ Law, as the collective means by which we maintain social order through rules and processes for resolving disputes, has somehow come to seem unworthy of serious academic attention.⁵⁰

Thus, it serves the Pretoria Crits' agenda to insulate our law students from contact with the law as a practical craft – the active doing of the lawyer's task – and replace it with theoretical abstractions. That is why they insist that the central focus of legal education should not be on "fixing and solving" legal problems, but on abstract theorising – "exploring, questioning, and transgressing fixed frameworks".⁵¹

However, as any practicing lawyer knows, theorising has never solved anything. It is only when theory is combined with doing – the ability to use the law and legal process – that change comes about. As Jerome Frank reminded American lawyers in a famous dissent: "A legal system is not what it says, but what it does ... It is the substantive rule only as it trickles through

⁴⁵ See Lubet 1997 *U Ill L Rev* 203.

⁴⁶ Modiri 2014 *Acta Academia* 16; Van Marle and Modiri 2012 *SALJ* 211.

⁴⁷ Schwartz 1985 *J Leg Ed* 20. A US Crit has described Kennedy as a "cross between Rasputin and Billy Graham. Machiavellian ... with the seductiveness of a revivalist preacher ... Kennedy wants your soul". Schlegel 1984 *Stanford L Rev* 392.

⁴⁸ For elaboration on this point, see Gravett 2018 *SALJ* (forthcoming).

⁴⁹ Ayer 1993 *Mich L Rev* 2150-2151.

⁵⁰ Ayer 1993 *Mich L Rev* 2157.

⁵¹ Modiri 2016 *Stell LR* 529.

the screen of action – which counts in life".⁵² Practising law consists of thought *and* action.

Legal problems require solutions. A client facing "imprisonment or poverty or a ruined life"⁵³ usually does not need a lawyer to critically deconstruct her problem. What the client is looking for is not insights into "critical legal studies, feminist legal theory, critical race theory and queer theory".⁵⁴ The client needs a lawyer to help her "make repairs or salvage some of the wreckage".⁵⁵

Clients need practitioners, not philosophers or pedagogues. That this observation might annoy some in legal academia is a risk worth taking to encourage a renewed appraisal of the need for skills training in the LLB curriculum. It is trite that law has significance only in relation to the underlying human problems that it is able to solve. Legal education can be truly relevant only if it produces law students who are equipped with transferable intellectual skills that they can then use in socially constructive endeavours.

Thus, legal education must develop the skills of legal writing, negotiating, oral advocacy, as well as purely intellectual skills. The simple fact is that without skills training the lawyer is only partially qualified – and indeed ill-qualified – to protect clients' interests.⁵⁶ In Karl Llewellyn's⁵⁷ words:

Technique without ideals may be a menace, but ideals without technique are a mess; and to turn ideals into effective vision, in matters of law, calls for passing those ideals through a hard-headed screen of effective legal technique ... It is for the practice of law that we are to train.

The simple fact – and the fundamental flaw at the heart of the Pretoria Critics' argument – is that no amount of pie-in-the-sky theorising could morph law into yet another discipline in the faculty of humanities. They refuse to see the law school for what it is – a professional school situated in a university, similar to schools of engineering, medicine, management, and accountancy. This means that university law schools have a dual character inasmuch as they are both academic and professional. Law schools treasure their university base and its ties to traditions and inquiry. At the same time, they conceive it

⁵² *United States v Antonelli Fireworks Co* 155 F2d 631, 662 (2d Cir 1946) (Frank J, dissenting).

⁵³ Frank 1947 *Yale L J* 1310.

⁵⁴ Frank 1947 *Yale L J* 1310.

⁵⁵ Asper 1965 *Md L Rev* 285.

⁵⁶ See generally Burger 1967-1968 *Washburn L J* 19.

⁵⁷ Llewellyn *Jurisprudence* 346.

as one of their missions to contribute to the preparation of students who expect to be practising lawyers.⁵⁸

2.2 The "education/training" dichotomy is a red herring

I take note of the criticism by Stuart Woolman *et al*⁵⁹ of Ziyad Motala's suggestion to incorporate legal research and writing courses into the LLB, based upon the first-year writing courses found in law schools in the United States. It is indeed so that "South Africa is not the United States", but that does not mean that we have nothing to learn from the United States legal academic model. In the United States the "education/training" dichotomy has been exposed as a red herring.

Commencing as pure apprenticeship training in law offices in the tradition of medieval crafts guilds,⁶⁰ legal education in the United States underwent a revolution and became firmly established as a university discipline when "that brilliant neurotic", Christopher Columbus Langdell, became dean of Harvard Law School in 1870.⁶¹ To Langdell, the experience of the practising lawyer, in his office, with clients and in the courtroom, were improper materials for the law teacher and his student.⁶² Langdell's teaching philosophy can be summarised as follows:⁶³

First that law is a science; second that all the available materials of that science are contained in printed books.' This second proposition ... was 'intended to exclude the traditional methods of learning law by work in a lawyer's office, or attendance upon the proceedings of courts of justice' ... 'What qualifies a person to teach law', wrote Langdell, 'is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in the trial or argument of causes, not experience, in short, in using law, but experience in learning ...

This factitious divorce between "law in books" and "law in action" prevailed for a century. United States legal academics were finally rattled out of their elitist intellectual complacency by Chief Justice Warren E Burger in the Sonnett Lecture delivered on 26 November 1973 at Fordham University. In his forthright clarion call for better trained lawyers, Burger⁶⁴ observed that:

⁵⁸ Keeton 1981 *Md L Rev* 203.

⁵⁹ Woolman, Watson and Smith 1997 *SALJ* 44-46; Motala 1996 *SALJ* 695.

⁶⁰ Burger 1980-1981 *Fordham L Rev* 1.

⁶¹ Frank 1947 *Yale L J* 1303.

⁶² Frank 1947 *Yale L J* 1303-1304.

⁶³ Frank *Courts on Trial* 226. Also see Spiegel 1987 *UCLA L Rev* 581; Morse 1982 *L Libr J* 235.

⁶⁴ Burger 1973 *Fordham L Rev* 230.

We are more casual about qualifying the people we allow to act as advocates in the courtrooms than we are about licensing our electricians ... This a curious aspect of a system that prides itself on the high place it accords to the judicial process in vindicating peoples' rights.

Burger argued that law schools were not sufficiently emphasising professional ethics, manners and etiquette, which are essential to the lawyer's basic function, and that law schools were failing to provide adequate and systematic programmes by which students could focus on the elementary skills of advocacy.⁶⁵ Bar associations and the profession obviously had a role to play in the trial advocacy training of young practitioners, but the Chief Justice's message was clear – law school is where the groundwork must be laid.⁶⁶

Predictably, the law schools, steeped in their Langdellian bookishness, did not eagerly embrace the idea of teaching trial advocacy – and the more elite the law school, the less enthusiastic it appeared.⁶⁷ "We are not running a trade school", was the common refrain from law deans and legal academics.⁶⁸ However, the criticism of the bench and the persistence of the American Bar Association (ABA) bore fruit. In 1987 an ABA report prepared under the direction of leading educators, practitioners and judges proclaimed that "professional skills training had become a standard part of the law school curriculum".⁶⁹ Moreover, specifically with regard to the objectives of legal education, "training for competence [was] placed as the second major objective immediately after training in analytical skills".⁷⁰

Today, there is no longer even a debate over whether law schools should teach advocacy skills.⁷¹ United States law schools have at long last discovered that, although the conceptual skills traditionally stressed in their

⁶⁵ Burger 1973 *Fordham L Rev* 232. Prior to his Sonnet Lecture, Chief Justice Burger had also observed that: "... 75 per cent of lawyers appearing in the courtroom were deficient by reason of poor preparation, lack of ability to conduct a proper cross-examination, lack of ability to present expert testimony, lack of ability in the handling and presentation of documents and letters, lack of ability to frame objections adequately, lack of basic analytic ability in the framing of issues, lack of ability to make an adequate argument ... lack of understanding of basic courtroom manners and etiquette, and a seeming unawareness of many of the fundamental ethics of the profession". Burger 1967-1968 *Washburn L J* 16-17. See also Stein 1990-1991 *Minn L Rev* 954.

⁶⁶ Burger 1973 *Fordham L Rev* 233.

⁶⁷ McCarthy 2008 *Stetson L Rev* 123.

⁶⁸ McCarthy 2008 *Stetson L Rev* 123. See, for example, the comments of the Dean of Columbia Law School, as reported in *The New York Times* 16 September 1975 at 82, as quoted in Clare 1975-1976 *St John's L Rev* 465.

⁶⁹ As quoted in Carlson 1989 *Ga L Rev* 691-692.

⁷⁰ Carlson 1989 *Ga L Rev* 691-692.

⁷¹ Ohlbaum 1993 *Temp L Rev* 2.

curricula are necessary, they were certainly not sufficient to produce practice-competent graduates.⁷² The basic trial advocacy course, "combin[ing] analytical skills with persuasive techniques", has become an integral and permanent part of the curricula of virtually every accredited law school in the United States, including those of all of the so-called "elite intellectual law schools" (Yale, Harvard, Stanford, Columbia, New York University and others) that produce the vast majority of legal academics in the United States.⁷³

Thirty years ago, United States law schools came to a realisation that the Pretoria Crits fail, or, more likely refuse, to grasp: Theoretical and practical training are not incompatible. Skills education does not entail training only in the performance of specific tasks. Clinical problem solving is in essence a complementary means by which an expanded set of analytical skills can be developed, expressed and evaluated.⁷⁴

William Twining also identified the false antithesis between the "lawyer as Pericles" and the "lawyer as plumber", between "academic" and "practical", "theory" and "practice", "liberal" and "vocational", as the Achilles heel of legal education in the United Kingdom.⁷⁵ This so-called antithesis is false, because it assumes that a vocational approach is necessarily incompatible with such values as free inquiry, intellectual rigour, independence of thought, and breadth of perspective. As Twining also pointed out, the modern American law school – especially the "elite" institutions on the eastern seaboard – has shown that such so-called incompatibility was the product of intellectual snobbery, and devoid of any substance.⁷⁶

The false "education/training" dissension that the Pretoria Crits attempt to advance, results in a fractionalised conception of legal education as a system of diverse and conflicting educative elements. The tension implicit in this division has caused the Pretoria Crits to stress the importance of their radical brand of critical legal theory over all other elements of legal education. However, there is no one educative keystone in legal education.⁷⁷ Legal education is one dynamic, a spectrum consisting of a broad sequence of

⁷² Kaufman 1978 *ABA J* 1626.

⁷³ Lubet 1990-1991 *Notre Dame L Rev* 721.

⁷⁴ Anderson and Catz 1981 *Wash U L Q* 739.

⁷⁵ "Both the Periclean and the plumbing images are quite inadequate: they are crude, over-simplified and unrealistic." Twining 1967 *LQR* 421-422.

⁷⁶ Twining 1967 *LQR* 422.

⁷⁷ Holmes 1976 *Columbia L Rev* 562.

related and dependent qualities.⁷⁸ It is a whole, an interweaving of the theoretical, the doctrinal, and the practical.⁷⁹

Why can so-called "vocational training" in law not be left exclusively to practice? As Twining⁸⁰ put it:

Experience is often potentially the best teacher, but unaided the man of action is not always an equally good learner. In respect of such matters, legal educators could probably learn much from the Armed Forces, the medical schools and from those involved in industrial training, perhaps even from those connected with the training of real plumbers.

2.3 What does it mean "to think like a lawyer"?

Most legal academics would agree that the purpose of law school is not to amass and master an enormous body of detailed substantive law. Even if it were possible for students to acquire such a mass of information, what would be the point? The constantly evolving nature of the law, as evidenced by the sheer volume of case law and statutory authority that are published annually in ever increasing frequency, means that black letter law does not keep any better than fish.⁸¹

It is often stated that the *raison d'être* of a university legal education lies in a set of analytical skills that our students would (hopefully) master during law school – a set of transferable intellectual skills – that would then serve them in good stead throughout their professional careers.⁸² Thus, it is often said that the law school's primary obligation is, succinctly put, to develop in the law student the ability "to think like a lawyer".⁸³

However, what legal academics usually mean by the phrase "to think like a lawyer" – the development of analytical ability in examining mostly upper

⁷⁸ Holmes 1976 *Columbia L Rev* 562.

⁷⁹ Nivala 1989 *N M L Rev* 239.

⁸⁰ Twining 1967 *LQR* 423.

⁸¹ As Keeton explains, little of the doctrine that our students learn in law school will be remembered when needed, and it is easy and essential to go to the library and find the up-to-date doctrine when needed. Keeton 1981 *Md L Rev* 203.

⁸² Imwinkelried 1988-1989 *Ga L Rev* 663.

⁸³ See, for example, Tauro 1976 *B U L Rev* 644. Not surprisingly, to the Pretoria Crits, the educational objective of training law students to develop the cognitive mindset of "thinking like a lawyer" is informed by the "problematic" assumption that the "primary ... role of the law school is to produce law graduates who are capable of entering the private legal profession". Modiri 2013 *Stell LR* 460. According to the Pretoria Crits, current legal education also has a "drive to interpolate students into 'thinking like a lawyer', which translates into the adoption of an objective, rational, dispassionate, legalistic, formal and stoic demeanour, sensibility and vocabulary". This "lawyer" has an "obviously fabricated and impossible character", and represents "unethical Machiavellianism". Modiri 2016 *Stell LR* 512.

court opinions, distinguishing cases, and construing or criticising legal doctrine – only develops a narrow intellectual quality. As one American legal scholar put it: "Law schools are like McDonalds: They do what they do ... well, but they don't do very many things".⁸⁴ University law schools focus almost exclusively on a limited subset of the skills that are of crucial importance in practising law: one fundamental cognitive skill – analysis – and one fundamental applied skill – legal research.⁸⁵ We are not preparing our students for other, equally crucial lawyering tasks – negotiating, client counselling, witness interviewing and trial advocacy.⁸⁶ Jerome Frank⁸⁷ asks pointedly:

University law teaching ... is supposed to teach [students] what they are to do in court-rooms and law offices. What the students see is a reflection in a badly-made mirror of a reflection in a badly-made mirror of what is going on in the work-a-day life of lawyers. Why not smash the mirrors? ... Why ... does what we teach as 'law' so little resemble 'law' as practiced?

Thinking like a lawyer is a "much richer and more intricate process" than merely collecting and manipulating doctrine.⁸⁸ We cannot say that we are fulfilling our goal to teach students to "think like lawyers", because the complete lawyer "thinks" about doctrine *and* about trial strategy *and* about negotiation *and* about counseling.⁸⁹ The complete lawyer possesses many other skills necessary for competent lawyering. Frank⁹⁰ argued that "[t]he [l]aw student should learn, while in school, the art of legal practice". That means that our university law schools should "boldly, not shyly or evasively"⁹¹ teach law students how to negotiate, how to try cases, and how to work with clients.

Thus, even assuming, *arguendo*, that university law schools succeed completely in their aim of teaching students to "think like lawyers", the fact that law students spend four or five years⁹² with us, while we teach them nothing, or precious little, of what it means to "act like a lawyer" is profligate.⁹³ While law students must develop superior analytical skills and a fundamental understanding of the law, they must also learn – in the law school setting – to

⁸⁴ Bayless Manning as quoted in Pirie 1987 *J Leg Ed* 577.

⁸⁵ Cramton 1982 *J Leg Ed* 327.

⁸⁶ Cramton 1981 *U Ark Little Rock L Rev* 7.

⁸⁷ Frank 1947 *Yale L J* 1312.

⁸⁸ Frank 1947 *Yale L J* 1312.

⁸⁹ Edwards 1992 *Mich L Rev* 58.

⁹⁰ Jerome Frank as quoted in Stevens *Law School* 156.

⁹¹ Jerome Frank as quoted in Stevens *Law School* 156.

⁹² Depending on the students' course of study (LLB or BA/BCom LLB) and assuming, of course, students graduate on time.

⁹³ See Clare 1975-1976 *St John's L Rev* 463.

put these skills to work.⁹⁴ An LLB curriculum that only produces graduates who can "think like lawyers" in the narrow sense, ill-serves them, the profession and the public.⁹⁵ Students cannot learn to think properly as lawyers unless they understand what makes a legal advocate competent.⁹⁶ We cannot really teach students to think like lawyers without simultaneously teaching them what lawyers do.⁹⁷

The so-called dichotomy in legal academic circles between "skills" and "substance", between "education" and "training", should be banished from our thinking. Contrary to what the Pretoria Crits would have us believe, university law schools do not have to choose between teaching law as an intellectual discipline and teaching skills. We can do both, and each can enrich the other.⁹⁸

The university law school is neither an ivory tower nor an assembly line.⁹⁹ Clearly, a combination of the practical and theoretical approaches is required; an LLB curriculum consisting of both traditional legal study intertwined with ample opportunity for clinical coursework. The university law school must introduce students to lawyering in all its dimensions.¹⁰⁰ The goal of the university law school should be nothing less than producing young lawyers who can combine intellectual and performance demands, stand on their own feet and competently serve the public.¹⁰¹

2.4 "Skills" is not a dirty word

The Pretoria Crits' we-are-not-running-a-trade-school-mentality evinces their scholarly esotericism and intellectual elitism. But "skills" is not a dirty word in the context of a university legal education.¹⁰² Of course, the word "skills" is subject to many interpretations. I use "skills training" not in the sense of courses that teach students how to act or where the court is. In addition to teaching law students trial advocacy skills, techniques of written and oral persuasion, the practical aspects of lawyering – negotiating, interviewing, counselling – skills courses in the LLB must be designed to demonstrate the

⁹⁴ Wolfe 1980-1981 *Tulsa L J* 212.

⁹⁵ Nivala 1989 *N M L Rev* 263.

⁹⁶ Christensen 1984 *Utah L Rev* 680. Clinical education, for example, places students in a controlled and monitored environment in which they can both think and act like lawyers.

⁹⁷ Schultz 1992 *J Leg Ed* 57.

⁹⁸ Civiletti 1981 *ABA J* 577.

⁹⁹ Nivala 1989 *N M L Rev* 246.

¹⁰⁰ Nivala 1989 *N M L Rev* 238.

¹⁰¹ Nivala 1989 *N M L Rev* 244, 246.

¹⁰² Pertnoy 1994 *Mo L Rev* 186.

importance of legal research, the analysis of facts within the framework of the law, a general facility with words, and the moulding of a solution to meet the needs of a client. No legal academic of whom I am aware has any interest in a course that teaches students how to be plumbers.

The value of skills courses is apparent to both law students and practitioners. Final-year LLB students with whom I speak are almost universally enthusiastic about their clinical experience, most often describing it as one of the most memorable and valuable experiences at law school. Once we recognise the wide variety of talents needed by competent lawyers, and once we stop erecting artificial barriers between the learning of theory and its application, it becomes patently obvious that "skills" training is more than just an appropriate part of a legal education – it is essential if we are to do the job we claim to be doing.¹⁰³

Why is it important to find the right balance in our curriculum between scholastic and skills training? The university law school, inasmuch as it controls the process of the admission of prospective law students, is the first gatekeeper of the profession. The role of the legal academic includes control over the only training experience common to all members of the legal profession: attendance at law school.¹⁰⁴ Statistics show that at least half of all law graduates in South Africa do not enter the legal profession, or having entered it, remain in it.¹⁰⁵ Is it possible that at least part of this attrition occurs because our law schools are sending fledgling lawyers out into the world without any idea of what to expect?

As Nic Swart made clear at the LLB Summit in 2013, university law schools do not currently prepare students to meet the high expectations they are likely to encounter in practice. However, we charge tuition, and we certify some degree of proficiency at the time of graduation. Therefore we have, I contend, accepted the responsibility to prepare our students for their postgraduate lives in a meaningful way. A university law school offers a unique opportunity to use four or five years¹⁰⁶ of concentrated study in an institutional setting to provide future lawyers with both the skills and values they need to provide essential legal services to the community.

If the profession is to improve the quality of the services it provides to the public, it is necessary for the law schools to recognise that their students must

¹⁰³ Pertnoy 1994 *Mo L Rev* 186.

¹⁰⁴ Borthwick and Schau 1991-1992 *U Mich J L Reform* 193.

¹⁰⁵ Pantaziz 2013 *Advocate* 22.

¹⁰⁶ Depending on the LLB or BA/BCom LLB study routes.

receive the skills needed to put into practice the valuable knowledge and analytical abilities they learn in the substantive courses.¹⁰⁷ We have an obligation to balance the LLB curriculum with courses in professional competence, including trial advocacy – courses that expose our students to what actually occurs in lawyer-client relationships and in courtrooms. The skills our law students would acquire in these skills courses are essential to graduating qualified, minimally-competent lawyers whom we can hand over to practice to complete their training. Of course, the goal is not for law schools to turn out expert trial lawyers upon graduation – but law graduates who at least are able to perform the fundamental advocacy skills needed in the courtroom.¹⁰⁸

3 Conclusion

Law schools are not trade schools. The teaching of technique can never be the law school's only goal. The intellectual discipline of law is crucially important. There are no other institutions that can assume primary responsibility for it. It is still the first reason for the existence of the university law school. I am not advocating a plan for legal education that will produce mere legal technicians. It is imperative that our graduates be considerably more than that.

As further expounded in Part 2 of this contribution, I do not propose adding clinical courses to the LLB curriculum that centre solely on technique or performance, with insufficient regard to the intellectual mission of the law school. To the extent that university law schools offer clinical skills courses in trial advocacy, interviewing, negotiation and client counseling, they must incorporate within that teaching a depth and breadth of legal inquiry that is consistent with the essence of the university law school mission. An important aspect of that intellectual mission requires students to explore and evaluate the divergencies between the presumed operation of the law, as expressed through legal rhetoric, and the law's "actual" operation in the courts.¹⁰⁹ For legal education to be relevant it should aim to produce lawyers who are able to critically evaluate legal practice in a broad context, and to promote a

¹⁰⁷ Devitt 1979 *ABA J* 1802.

¹⁰⁸ Mannion 2009-2010 *Pace L Rev* 1204.

¹⁰⁹ Hunter 1996 *Law Teacher* 334. Law schools are academic institutions, and from the perspective of skills courses, the legal academy has two responsibilities: to teach the practices of the real world, and to submit those practices to vigorous challenge and examination. Hegland 1982 *J Leg Ed* 71-72.

direction of legal practice, not only to the optimal need of lawyer/client, but also towards broader community needs.¹¹⁰

The academy must provide more than experience and insight: it must nourish conscience.¹¹¹ The LLB curriculum is not designed as a cram course for admission to the profession. We are not preparing technocrats for technical roles; rather, we are preparing lawyer-professionals for the diffuse and complex roles that they bear in our society.¹¹²

At bottom, "professional education" must focus on certain skills with respect to which a trained "professional" – the lawyer – can be viewed as an authority. Historically, professions have differed from other honourable pursuits such as that of the carpenter or bricklayer in that a profession lays claim at least to placing public duty ahead of private gain. A profession is expected to enforce high standards of conduct, and to teach young members of the calling.¹¹³

Our profession carries public and ethical burdens with its privileges. As a profession with a monopoly over the performance of certain legal services, we have a special obligation to the consumers of justice to be energetic and imaginative in producing the best quality of justice at the lowest possible cost, and with a minimum of delay. Lawyers can fulfill that high mission only if they are properly trained.¹¹⁴

On the one hand, it is unrealistic to expect law schools to turn out a fully-finished product capable of handling any legal task. On the other hand, law schools cannot avoid the responsibility that comes with being one of the gatekeepers of the profession – the obligation to provide a basic grounding in the knowledge and skills that are fundamental to most activities undertaken by lawyers. The university law school must help students form the habits and skills that will carry over to a lifetime of practice.¹¹⁵

The academic agenda that the Pretoria Crits have construed, makes clear that they care exclusively about intellectual movements in the faculty of humanities, and not at all about the activities of the bar and bench. They lack any feel whatsoever for the substantive and institutional problems of the legal profession.¹¹⁶ The Pretoria Crits do not care to venture beyond the ivy-

¹¹⁰ See Hunter 1996 *Law Teacher* 330.

¹¹¹ Hegland 1982 *J Leg Ed* 72.

¹¹² See Cramton 1982 *J Leg Ed* 322.

¹¹³ Burger 1967-1968 *Washburn L J* 24.

¹¹⁴ Burger 1973 *Fordham L Rev* 236.

¹¹⁵ See Cramton 1982 *J Leg Ed* 323.

¹¹⁶ See Wellington 1987 *J Leg Ed* 327.

covered walls, they deprecate the practising lawyer and his work, and they look for rewards only from within the university.¹¹⁷ This phenomenon would not matter as much if it were not for the inescapable fact that the university law school is not a department in the faculty of humanities. We are a professional school that enrolls hundreds of students each year who are overwhelmingly headed for professional life.

Law students who are taught that theoretical discourse is the be-all and end-all, and that practitioners are "sell-outs", will be woefully unprepared for legal practice. Those students will not understand how to practice law as a *professional*. Law school is where they will begin to define themselves as professionals. They will have gained the impression that the practice of law is necessarily grubby, materialistic and self-interested, and will not understand in any concrete way what professional practice means.¹¹⁸

Law students need concrete ethical training. They need to understand why *pro bono* work is important, and how to balance a commitment to *pro bono* work with profit-seeking. They need to understand their duties as "officers of the court", and how to balance those duties with their duties as "advocates" for their clients. In short, law students need to know, before they enter full-time employment, what ethical practice means. Otherwise, their only model of the practicing lawyer may well be crudely materialistic.¹¹⁹ Should the Pretoria Critics' glorifying of theory over practice prevail as the dominant model for university legal education, many law graduates may set forth each year to pursue a livelihood "that they are encouraged to see redeemed only by the lucre with which it will line their pockets, at least for a while".¹²⁰

I should state clearly that I do not doubt for a moment the importance of theory in legal education. This contribution is certainly not a call for the abolition or suppression of legal theory. A great professional school can never be anti-theoretical. We have an obligation to offer our students a broader perspective on the world in which lawyers function. Legal doctrine did not develop and does not exist in a vacuum. We should discuss theoretical underpinnings and broad ethical and normative concepts with our students. The need for an understanding of other disciplines – history, psychology, philosophy sociology and economics – becomes apparent after even the most cursory examination of the range of problems lawyers and judges face on a daily basis. It is also crucial for law students to understand and apply theoretical

¹¹⁷ Wellington 1987 *J Leg Ed* 327.

¹¹⁸ Edwards 1992 *Mich L Rev* 38.

¹¹⁹ Edwards 1992 *Mich L Rev* 38.

¹²⁰ Ayer 1993 *Mich L Rev* 2152.

frameworks and philosophical concepts so that their thinking about the legal professions is infused with depth and breadth.¹²¹

To the extent that legal theory can help our law graduates prepare for lifelong critical reflectiveness about the law, legal institutions, the profession, and their own lives in the law, it obviously needs no further justification for its place in the LLB curriculum. Even that most realistic of legal realists, Jerome Frank,¹²² said:

An interest in the practical should not preclude, on the contrary it should invite, a lively interest in theory ... [T]hose "practical" lawyers who decry legal theory as frivolous are, despite themselves, legal theorists, legal philosophers. But their philosophies, their theories, are usually inarticulate, so that they delude themselves and surrender in practice to their own unexamined, uncriticized principles.

There is, however, a limit to how much a professional school can emphasise pure reflectiveness or detached inquiry or intellectualism for its own sake.¹²³ There is a limit because there is also a cost in terms of the distribution of assets and resources. Our students have a great deal to learn, only some of which is moral philosophy, feminist jurisprudence and political science. I differ with the Pretoria Critics in that I believe theory is a valuable component of a pluralist legal education, but it does not merit exaltation to the sublimation or exclusion of all other elements of legal pedagogy.

We cannot allow theory to displace the "professional" content of the law school curriculum. A more balanced legal education will fuse thoughtful, creative ideas with the ability to implement those ideas in ways that are beneficial in practice to individual clients and to society in general. This is more in line with the concept of a university law school as envisioned by Thomas Jefferson:¹²⁴

[A bridge between] the worlds of ideas and affairs, supporting traffic in both directions to bring academic thought into contact with reality[,] and practical governance into contacts with disinterested inquiry, with benefits flowing in both directions.

We should not produce good technicians with nothing to say any more than great thinkers who are unable to translate their thoughts into any kind of

¹²¹ The so-called "law and" movements – eg, law and economics, law and literature, law and sociology – and critical legal theory, critical race theory and feminist legal studies have the potential to serve important educational functions, and, therefore, should have a permanent home in the university law school. Edwards 1992 *Mich L Rev* 35.

¹²² Frank 1947 *Yale L J* 1305-1321.

¹²³ Lubet 1997 *U Ill L Rev* 211.

¹²⁴ As quoted in Carrington 1992 *Duke L J* 792.

usable, concrete form. Our law schools cannot be successful in developing only "intellectuals" who are, at the same time, woefully inadequate practitioners. An emphasis on clinical courses – which focus less on theoretical analysis and more on the process by which a legal result is actually accomplished – will reset the scale and represent an acknowledgment that it is all right to be a lawyer.

Therefore, we should train our students not to be "ivory tower dilettantes"¹²⁵ in the Pretoria Critics' image, but to be lawyers, to be people of action, to understand what lawyers do, how they do it, and how it could be done better. Any legal education that focusses exclusively or predominantly on theory is deficient: "That is a passive, not an active, education. It is not an education for people who are to do".¹²⁶ Such an education fails in its basic duty of providing society with people-oriented and problem-oriented attorneys, advocates and advisors.¹²⁷ To my mind, nothing could be more absurd than to neglect in education those practical matters that are necessary for a person's future calling.

I would hope that free and critical inquiry, breadth of perspective, intellectual discipline and independence of thought and judgment are the byproducts of a university education in general. A university education should do more than tax the mind. It should prepare the student to live in, and contribute meaningfully to, contemporary society. However, it is not, and cannot be, the principal goal of any specific faculty, especially not the professional schools. Just as the faculty of engineering trains engineers, and the faculty of health sciences trains doctors and dentists, we are teaching law, training lawyers. In addition to teaching theory and doctrine, our job is to inculcate in our students an appreciation of the day-to-day processes of the law in action in their social context.

The United States legal realist scholar, Karl Llewellyn,¹²⁸ expressed this goal thus:

[I]f there is be one school in a university of which it should be said that there [students] learn to give practical reality, practical effectiveness, to vision and to ideals, that school is the school of law.

¹²⁵ Edwards 1992 *Mich L Rev* 41.

¹²⁶ Nivala 1989 *N M L Rev* 260.

¹²⁷ Burger 1980-1981 *Fordham L Rev* 6

¹²⁸ Llewellyn *Jurisprudence* 391.

The primary goal of the university law school must be the education of professionals capable of good lawyering performance.¹²⁹ We should, in other words, be teaching Pericles to be able to fix a leaky pipe.

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¹²⁹ Nivala 1989 *N M L Rev* 238.

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List of Abbreviations

ABA	American Bar Association
ABA J	American Bar Association Journal
B U L Rev	Boston University Law Review
CLS	Critical Legal Studies
CHE	Council on Higher Education
Columbia L Rev	Columbia Law Review
Cornell L Rev	Cornell Law Review
Duke L J	Duke Law Journal
Fordham L Rev	Fordham Law Review
Ga L Rev	Georgia Law Review
J Leg Ed	Journal of Legal Education
L Libr J	Law Library Journal
LQR	Law Quarterly Review
LSSA	Law Society of South Africa
Md L Rev	Maryland Law Review
Mich L Rev	Michigan Law Review
Minn L Rev	Minnesota Law Review
Mo L Rev	Missouri Law Review

N M L Rev	New Mexico Law Review
Notre Dame L Rev	Notre Dame Law Review
Pace L Rev	Pace Law Review
SALJ	South African Law Journal
Stanford L Rev	Stanford Law Review
Stell LR	Stellenbosch Law Review
Stetson L Rev	Stetson Law Review
St John's L Rev	St John's Law Review
Temp L Rev	Temple Law Review
Tulsa L J	Tulsa Law Journal
UCLA L Rev	University of California at Los Angeles Law Review
U Ark Little Rock L Rev	University of Arkansas at Little Rock Law Review
U Ill L Rev	University of Illinois Law Review
U Mich J L Reform	University of Michigan Journal of Law Reform
Utah L Rev	Utah Law Review
Washburn L J	Washburn Law Journal
Wash U L Q	Washington University Law Quarterly
Yale L J	Yale Law Journal